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In the

Supreme Court of The United States

October Term, 1965

NO. 587

BILLY MITCHELL VILLAGE, INC.
Petitioner

Vs.

NEW YORK LIFE INSURANCE CO.,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

Respondent, New York Life Insurance Co., files this its Brief in Opposition to the Petition for Writ of Certiorari heretofore filed herein by Petitioner, Billy Mitchell Village, Inc., in the above captioned and numbered cause, and in support thereof, Respondent would respectfully show the Court:

STATEMENT

Respondent makes the following statement in addition to that contained in pages 5-8 of the Petition:

On November 4, 1963, Petitioner filed the suit to restrain a sale by the substitute trustee under the deed of trust described in Respondent's cross-action. On November 14, 1963, Respondent filed a cross-action for judgment on its note, foreclosure of the deed of trust and chattel mortgage, interest, costs, and attorneys' fees. (Tr. p. 1-4).

On December 7, 1963, Petitioner answered the cross-action by general denial and alleged that its note was not in default because Petitioner had on deposit with Respondent the sum of approximately One Hundred Ninety-Eight Thousand Five Hundred Dollars ($198,-500.00) in a "reserve for replacements" account. (Tr. p. 19-20). The answer to the cross-action did not pray for an accounting of the "reserve for replacements" account.

On December 27, 1963, Respondent filed a first amended original petition which admitted the execution and delivery of the note and deed of trust; alleged that the "reserve for replacements" account should be applied to cure the delinquent installments on the note; requested a declaratory judgment to determine the amount actually owed Respondent; and alleged a conspiracy between Respondent, the Commissioner of the Federal Housing Administration, and the Secretary of the Air Force to acquire Petitioner's property, to Petitioner's damage in the sum of $1,500,000.00. In this first amended original petition Petitioner prayed for an accounting of the "reserve for replacements" fund and for damages in the sum of $1,500,000.00 (by virtue of the conspiracy) against Respondent, the Commissioner, and the Secretary. (Tr. p. 74)

In said first amended original petition Petitioner (plaintiff) alleged as follows:

> "... plaintiff's housing units have been about one-third occupied, causing plaintiff to be unable to make the payments provided for in its note held by defendant, New York Life Insurance Co."

Prior to the filing of Petitioner's first amended original petition Respondent had filed a motion for summary judgment on its cross-action. (Tr. p. 21). The trial court granted the motion for summary judgment on the cross-action, entered judgment against Petitioner for the sum of $2,445,084.07 (the balance due on the note), for attorneys' fees, for foreclosure of the deed of trust and chattel mortgage, and for interest. (Tr. p. 85-88) (Appendix "C" of Petition for Writ of Certiorari).

Respondent then filed a motion to sever the cross-action from the causes of action set out in Petitioner's first amended original petition. (Tr. p. 92). The court ordered a severance of Respondent's cross-action from Petitioner's suit against the Respondent, the Federal Housing Commissioner, and the Secretary of the Air Force. The order further reflected that the summary judgment previously rendered for Respondent on its cross-action was made final. (Tr. p. 93) (Appendix "A" this Brief).

Respondent presented to the trial court (as a part of its motion for summary judgment) the charter of Petitioner which provides as follows with respect to the disbursement of funds from the "reserve for replacements" account:

> "Disbursements from such fund, whether for the purpose of effecting replacements of structural elements, furnishings and mechanical equipment of

the project, or for any other purpose, may be made only after receiving the consent in writing of the holders of the first preferred stock." (Tr. p. 29).

It is undisputed that the Federal Housing Administration was the holder of the first preferred stock. (Petition for Writ of Certiorari p. 9-11).

It is undisputed that the Federal Housing Administration had not given its consent to any disbursement from the "reserve for replacements" account to be applied to the payment of the note sued upon. (See Affidavit of C. T. Macleod, Tr. pp. 23-24).

It is undisputed that Petitioner defaulted on payments due on the note (Tr. pp. 6-8) after May 20, 1963, and that the principal balance of said note was the sum of $2,445,084.07, with interest thereon at the rate of 4% per annum from May 1, 1963. (Tr. pp. 44-45).

The note, upon which Respondent's cross-action was based, provided that if default was not made good prior to the due date of the next monthly installment, said note, at the option of the holder, shall become immediately due and payable without notice and the lien given to secure its payment may be foreclosed. (Tr. p. 6-8). The deed of trust contained similar provisions as to acceleration without notice. (Tr. p. 9-17).

Petitioner appealed to the Court of Civil Appeals which rendered an opinion adverse to Petitioner on February 26, 1965. (See Appendix "B" of the Petition for Writ of Certiorari). The Court of Civil Appeals overruled Petitioner's motion for rehearing in that court. Petitioner filed an application for writ of error to the Supreme Court of Texas which was overruled without opinion and with the notation: "No Reversible error." Petitioner's motion for rehearing in the Supreme Court of Texas was also overruled without opinion. (See Ap-

pendix "D" and "E" of the Petition for Writ of Certiorari),

Petitioner did not in the trial court, the Court of Civil Appeals, or in the Supreme Court of Texas ever raise, quote, or cite 24 CFR 280.30(d) (1949 Edition), a regulation promulgated by the Federal Housing Commissioner under the National Housing Act, which regulation is quoted in Appendix "H" of the Petition for Writ of Certiorari.

Petitioner did not at any time in the trial court, the Court of Civil Appeals, or in original submission of the cause to the Supreme Court of Texas ever mention or allude to the Fourteenth Amendment of the Constitution of the United States.

In its motion for rehearing in the Supreme Court of Texas, Petitioner made the following statement in the last paragraph thereof:

> "It is respectfully submitted that Petitioner has been denied due process of law when a final judgment was rendered against it in which no determination or credit was made with reference to its of more than One Hundred Ninety-eight Thousand Five Hundred Dollars ($198,500.00), which it had voluntarily deposited with Respondent."

ARGUMENT

I.

No Federal Question was Presented to the State Courts so as to Form a Basis for a Grant of the Petition for Writ of Certiorari.

Petitioner claims that the regulations issued by the

Federal Housing Commissioner in pursuance of 12 USC Sec. 1742 and particularly that regulation in 24 CFR 280.30(d) (1949 Edition) are involved as well as the Fourteenth Amendment to the Constitution of the United States.

With respect to the regulation the record shows that it was first mentioned by Petitioner in the Petition for Writ of Certiorari. It was not cited, mentioned, or alluded to by Petitioner in any of its pleadings or its briefs in any of the State Courts. The mention of said regulation by Petitioner at this stage is too late to present any question for review. Petitioner has not shown that the regulation was passed upon or considered by the State Courts. *Ellis v. Dixon,* 349 U.S. 458, 99 L ed. 1231, 75 S. Ct. 850 (1955) held that because the question of whether regulations issued by a Board of Education were unconstitutionally vague was not raised below said question could not be considered on certiorari.

Petitioner admits that the question of the Fourteenth Amendment to the United States Constitution was first raised in its motion for rehearing in the Supreme Court of Texas. (See the Petition for Writ of Certiorari, p. 8-9). The motion for rehearing in the Supreme Court of Texas was denied without written opinion. (See Appendix "E" to the Petition for Writ of Certiorari).

In *American Surety Company v. Baldwin,* 287 U.S. 156, 77 L. ed. 231, 53 S. Ct. 98 (1932), this Court dismissed a writ of certiorari for failure to seasonably make the constitutional claim in the State Court. The claim of violation of due process under the Fourteenth Amendment was first made by the petitioner in that case on Petition for Rehearing in the Supreme Court of Idaho. The Petition for Rehearing was denied without opinion. This Court, in an opinion by Mr. Justice Brandeis, said

the following in dismissing the Petition for Writ of certiorari:

> "The Federal claim there made cannot serve as the basis for review by this court. The contention that a Federal right had been violated rests on the action of the trial court in entering judgment without giving notice and opportunity to be heard. The same ground of objection has been raised throughout the proceedings but solely as a matter of State law. There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment."

In this case Petitioner never mentioned the Fourteenth Amendment to the Constitution of the United States until his motion for rehearing in the Supreme Court of Texas. It urged the failure of the court to require an accounting of the "reserve for replacement" fund throughout all of the Courts of Texas solely as a matter of State law.

The Petition for Writ of Certiorari in this case should be dismissed because the Petitioner failed to seasonably raise any alleged Federal question in the State Court.

II.

No Federal Question is Involved in this Case.

The United States, through the Federal Housing Administration, issued mortgage insurance on the obligation of the Petitioner. However, neither the United States nor the Federal Housing Administration is involved as a party. Petitioner, at page 12 of the Petition for Writ of Certiorari, admits that:

"The controversy in this case is between Petitioner and Respondent; neither the United States of America nor the Federal Housing Administration is involved."

This is simply a suit brought in a Texas court to recover on a note executed by a Texas corporation and to foreclose a deed of trust on Texas real estate which secured payment of said note.

Petitioner's contention that the case involves a Federal question is two-fold: (1) that the judgment of the State Court required an interpretation of a regulation issued by the Federal Housing Commissioner; and (2) that the entry of the judgment on the cross-action for the balance due on the note and foreclosure on the deed of trust was a denial of due process because the court did not first order an accounting and credit of the "reserve for replacement" fund.

These contentions will be discussed separately.

1. *Regulations of Federal Housing Commissioner not involved.* Petitioner concedes that the trial court was correct in not requiring Respondent to apply the funds from the "reserve for replacement" account to take up the delinquent installments on the note. (See Petition for Writ of Certiorari, p. 10). Petitioner's contention merely relates to the failure of the court to require an accounting and credit of the funds in the "reserve for replacement" account, prior to the rendition of judgment for the balance of the note and foreclosure of the deed of trust. The determination of this question did not involve a construction of the regulation of the Federal Housing Commissioner cited by Petitioner. The determination of this question is resolved by the provisions of the Petitioner's Texas charter, quoted above, and by the showing that the owner of the first preferred stock of Petitioner

had not consented to any disbursement from the "reserve for replamement" fund.

The provision of the charter, above quoted, provides that disbursement from the fund may be made only after receiving consent in writing of the holder of the first preferred stock. The Federal Housing Administration was the holder of the first preferred stock and it was not disputed that no consent for disbursement from such fund had been given.

The regulation cited by Petitioner is wholly immaterial. Whether the court would require Respondent to account for the fund and credit the judgment on the note with the balance, involved a construction of the charter of the Petitioner itself, the note, deed of trust, and other documents in the record. The question to be decided involved no Federal Law, regulation or statute but merely the interpretation of a Texas contract and a Texas corporate charter by a Texas court. Such did not present a Federal question. *Black v. Cutter Laboratories*, 351 U.S. 292, 100 L. Ed. 1200, 76 S. Ct. 824 (1956).

We also note that in each of the decisions by the United States Courts of Appeal (which were relied upon by the Texas Court), these Courts were applying the law of the jurisdiction in which the mortgage in suit was executed.

2. *No Denial of Due Process.* The action for accounting of the "reserve for replacement" fund together with the damage suit for the alleged conspiracy was severed by the trial court from the Respondent's suit on the note and deed of trust (Order of Severance, Appendix "A" in this Brief). This was in accordance with Rule 41 of the Texas Rules of Civil Procedure (which follows Rule 21 of the Federal Rules of Civil Procedure) which states:

"Any claim against a party may be severed and proceeded with separately."

Petitioner was not, by the trial court's judgment, deprived of the "reserve for replacements" fund. Such money would, as any other asset of the Petitioner, be properly applied againt any deficiency arising after the sale of the mortgaged premises, provided that it was not exempt or that the interests of third parties had not intervened.

The "reserve for replacements" account was not security for the note. The deed of trust was. As of the time that the judgment was rendered, the trial court simply decided that the *amount* of such fund could be determined at a later date and that its application to the judgment debt must await some showing that the holder of the first preferred stock consented to such disbursement in accordance with the charter of Petitioner.

None of the documents executed by the Petitioner gave it any legal right to apply these funds against the note debt as a condition for foreclosure of the deed of trust. At first, Petitioner contended that these funds should be applied to cure the delinquent installments on the note. Petitioner now concedes that the decisions of *United States v. Pine Hills Apartments, Inc.*, 261 F. 2d. 667, and *United States v. Queen's Court Apartments*, 296 F. 2d. 534, are correct in denying the use of the funds to cure the delinquent installments. (See the Petition for Writ of Certiorari, p. 10). Petitioner says the decisions are wrong in refusing to condition foreclosure on accounting and credit of such funds. In either case the approval of the Federal Housing Administration would be necessary to effect a legal disbursement of the funds under the Petitioner's charter. No such approval was given. Petitioner was denied no legal right to the fund by the

judgment which Petitioner seeks to have reviewed.

Petitioner was not denied any notice or any hearing or any opportunity to be heard concerning the reserve account. Its action for an accounting was severed and is still pending in the trial court. Petitioner will have the benefit of such funds to reduce any deficiency under the judgment after crediting the proceeds of the foreclosure sale. Should the property sell for enough to discharge the judgment debt, Petitioner would be entitled to a cash refund from the account. *United States v. Queen's Court Apartments,* supra.

III.

The Decision of the State Court in this Case was Correct on the Merits.

For purposes of this portion of the argument we will assume that the Federal questions were properly presented to the State Courts (which they were not); and that the State Court decision required the adjudication of Federal questions (which it did not).

In the preceding portion of the argument we have demonstrated that no constitutional question of due process is involved.

The regulation of the Federal Housing Commissioner, 24 CFR 280.30(d) (1949 Edition), specifies that the reserve for replacement shall be maintained "and conditions under which they shall be . . . used shall be specified in the . . . charter."

Petitioner's charter provision with respect to the reserve for replacement account shows that it could not be used except upon the written permission of the holder of the first preferred stock — the Federal Hous-

ing Administration. The Federal Housing Administration did not authorize a disbursement to Respondent of the monies in the account at the time that the summary judgment was heard. The trial court refused to order an accounting or credit of the reserve fund prior to entering a judgment for the balance due on the note and foreclosure of the deed of trust. The trial court severed the action for accounting along with the action for conspiracy; and thus preserved the Petitioner's right to an accounting of the funds.

The trial court's decision was in conformity with the charter of the Petitioner and certainly with the intent of the regulation of the Federal Housing Commissioner (although this was not presented to any Texas Court during the course of the litigation).

The Texas courts would have violated the provisions of Petitioner's charter if they had ordered a credit without the written approval of the Federal Housing Administration.

The claimed error in refusing to order an accounting and credit of the reserve fund prior to foreclosure is a sham. Petitioner claims that such was necessary so it could find out how much it would have to pay Respondent to avoid foreclosure.

If it be assumed that the court could have legally ordered such action, Petitioner has made no showing that it was ready, willing and able to pay the balance of such debt remaining after application of the credit.

The record shows that Petitioner was admittedly in default in the monthly installments called for by the note since May of 1963. Petitioner's own pleadings, quoted above, say that the reason for this default was that the housing units were only one-third occupied. By

necessary inference Petitioner admitted that its only source of funds (rentals from the housing units) was not adequate to meet the monthly installments. If this be true, Petitioner would be unable to pay the entire debt of over $2,445,084.07 even if it had been given credit for the sum of approximately $198,500.00 in the reserve account.

Never at any stage of the proceedings did Petitioner ever allege it was ready, willing and able to discharge the debt if the reserve fund had been credited against the balance.

Petitioner attempts to distinguish *Queen's Court* and *Pine Hill,* both supra, because the courts assumed the debt would not be paid and the foreclosure sale would be held. The record in this case could support no other conclusions. The Petitioner was delinquent for over seven months because the property was one-third occupied. Petitioner never alleged or contended that it was ready, willing and able to pay the debt remaining after credit of the reserve funds or that such credit itself would be sufficient to discharge the debt.

The decisions in *Pine Hill* and *Queen's Court,* supra, were correct and govern the decision of this matter.

CONCLUSION

WHEREFORE. Respondent respectfully prays that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,
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APPENDIX "A"

BILLY MITCHELL VILLAGE, INC.	IN THE DISTRICT COURT
Vs.	131ST JUDICIAL DISTRICT
NEW YORK LIFE INSURANCE COMPANY, ET AL	BEXAR COUNTY, TEXAS

ORDER OF SEVERANCE

This 12th day of March, 1964 on motion of the defendant and cross-plaintiff, NEW YORK LIFE INSURANCE COMPANY, it is hereby ORDERED that the cross action of the cross-plaintiff, NEW YORK LIFE

INSURANCE COMPANY, against cross-defendant, BILLY MITCHELL VILLAGE, INC., be, and it is hereby, severed from the suit of plaintiff, Billy Mitchell Village, Inc., against defendants, New York Life Insurance Company, P. N. Brownstein, Commissioner of the Federal Housing Administration, and Eugene M. Zuckert, Secretary of the Air Force, which shall hereafter bear No. F-157, 292A, and it is further ORDERED that the summary judgment rendered herein on January 8, 1964 is hereby accordingly made final. To which orders of the Court Plaintiff and Cross-Defendant duly excepted.

RENDERED AND SIGNED this 12th day of March, 1964.

SOLOMON CASSEB, JR.
District Judge, Presiding

APPROVED AS TO FORM:

GEORGE H. SPENCER
Attorney for Defendant and
Cross-Plaintiff New York
Life Insurance Company

LEVEY and GOLDSTEIN
by: JAY SAM LEVEY
Attorney for Plaintiff and
Cross-Defendant Billy Mitchell
Village, Inc.

END